Supreme Court of the United States

OCTOBER TERM, 1964

No. 52

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Plaintiffs-Appellants,

BENJAMIN E. SMITH and BRUCE WALTZER,

Intervenors-Appellants,

against

JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE LOUISIANA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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MOTION OF AMERICAN CIVIL LIBERTIES UNION AND LOUISIANA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Civil Liberties Union and its affiliate, The Louisiana Civil Liberties Union, respectfully move for leave to file a brief as *amici curiae* in support of the appellants in this case. The attorneys for appellants and for appellee Garrison have consented. Hon. Jack P. F. Gremillion, Attorney General of Louisiana as well as the attorney for appellee Pfister have refused consent. The consents and refusals have been filed with the Clerk of the Court.

Our interest is prompted not only by the fact that appellant Smith is Chairman, and appellant Waltzer a member, of The Legal Panel of The Louisiana Civil Liberties Union. More importantly, the interest of *amici* in this case arises from its important bearing on a principal civil liberties issue of the present day: Whether Federal rights and privileges, created to clear away the vestiges of chattel slavery, are to be rendered meaningful by the Federal courts; or whether they are to be smothered in the name of state sovereignty.

The resolution of this great issue will determine the primary arena of future racial controversy. If the value of legal rights remains undepreciated, the century-old effort to gain redress of Negro grievances can be expected to continue in judicial and legislative channels, including those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. If legal rights prove to be empty things, then despairing resort to extra-legal measures will be the bitter alternative.

Respectfully submitted,

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September, 1964

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Opinions Below

The opinions of the three-judge United States District Court for the Eastern District of Louisiana are reported at 227 F. Supp. 556.

Statutes Involved

The statutes involved are Louisiana Revised Statutes, Title 14, Sections 358 through 388, which include the Louisiana "Subversive Activities and Communist Control Law," and Louisiana Revised Statutes, Title 14, Sections 390 through 390.5, the Louisiana "Communist Propaganda Control Law."

Statement of the Case

On October 4, 1963, appellants Smith, Waltzer and Dombrowski were arrested in New Orleans on warrants charging violation of the Louisiana anti-subversion laws. The dissenting opinion below sets out the facts surrounding the arrests (R. 92):

> "At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Among the dangerous articles removed were Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from 'racial agitation'. An able, experienced, and independent-minded district judge of the Criminal District Court, for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests."

Notwithstanding their discharge, appellee Pfister publicly demanded enforcement of the anti-subversion laws against appellants. Consequently, they filed a complaint in the federal district court on November 12, 1963 to enjoin enforcement of the Louisiana statutes and to obtain a declaration of their unconstitutionality. Thereafter, a grand jury was convened in New Orleans Parish to consider indictments against appellants, but Judge Minor Wisdom of the Fifth Circuit Court of Appeals ordered prosecutive action restrained until the federal cause was determined by the three judge court.

The complaint charged and the appellants sought to prove by affidavits and in a written offer of proof that the threatened enforcement of these state laws was in every respect an attempt to enforce Louisiana's policy of racial segregation. The appellants asserted and offered to prove that the arrests, the raids, the seizure of books, files, and membership lists, and the threatened imprisonment of the appellants, were a conscious effort to frighten, intimidate and deter the appellants and thousands upon thousands of Negro citizens of Louisiana and those white citizens courageous enough to support them from challenging the denial by the state of equality under the law to its Negro citizens.

A majority of the court below dismissed the complaint on the ground that it failed to state a cause of action, and vacated Judge Wisdom's restraining order.

Subsequently, appellant Dombrowski was indicted under Rev. Stat., Title 14, §360, for failing to register as a member of, and for participating in the management of the Southern Conference Educational Fund, allegedly a "communist-front" organization. Appellant Smith was indicted on similar charges, and also for failing to register as a member of the National Lawyers Guild, allegedly a "communist-front." Appellant Waltzer was indicted for failing to register as a member of the National Lawyers Guild.

ARGUMENT

I.

The questioned Louisiana statutes are invalid.

The Louisiana Subversive Activities and Communist Control Law (La. Rev. Stat. 14:358 through 14:388) and Communist Propaganda Control Law (La. Rev. Stat. 14:390 through 14:390.5) are plainly invalid, on their face and as applied to appellants.

On their face, these statutes constitute forbidden invasions of the rights of speech, press, peaceable assembly and associational privacy. They provide for registration and public identification of the members of any organization "cited" by a Congressional committee or subcommittee as a Communist or Communist-connected organization. They punish, as a felony, knowing membership in "subversive" and "foreign subversive" organizations, which are defined in terms so vague and sweeping as to give a jury *carte blanche* in applying them to unpopular groups. They disqualify for public office all members of such organizations, regardless of *scienter*. They penalize the possession or distribution of writings prepared by any organization subject to registration, which are "reasonably adopted [*sic*] to * * * promote * * * any attitude * * * that tends to * * * encourage disrespect for duly constituted legal authority, either federal or state, or * * * promotes any racial, social, political or religious disorder."

For reasons well stated by Judge Minor Wisdom, dissenting in the court below (R. 89-92), the statutes are unconstitutional on their face, without regard to their alleged use for suppression of lawful claims for racial justice. Even if they contained separability clauses, which they do not, it would be impossible to carve out any provision not

infected by the pervasive effort at unconstitutional thought control. All we add to Judge Wisdom's opinion is the observation that this Court's decision in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), rendered after the present appeal was taken, removes any residual doubt as to the soundness of his conclusion.

A second, and independently sufficient, ground for reversal is that the statutes are invalid in their threatened application to appellants. The case comes up on the pleadings, supplemented by a detailed and circumstantial offer of proof in the nature of a bill of particulars; and for present purposes the factual allegations of appellants must be taken as true. They allege that appellees threaten to prosecute them under the questioned statutes for the sole purpose of deterring them from exercising rights guaranteed by the First and Fourteenth Amendments in their efforts to enforce the equality under the law which is guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments; and these efforts of appellants are alleged to consist of "attempting through peaceful and non-violent means to achieve the elimination of all forms of racial segregation in the states of the South and the State of Louisiana and to assist and encourage Negro citizens to exercise their rights to register and vote in federal and state elections." (R. 5, 20.)

As this Court well knows, Southern resistance to federal requirements of equality before the law has recently taken a new and menacing form. As Congress and the courts have made ever clearer the availability of equal protection of the laws to those Negroes who claim it, recalcitrant white supremacists have resorted more and more to the technique of discouraging the *making* of such claims. The modes of action are protean. They range from private reprisal such as boycott and murder, to official harassment. One of the most effective procedures is prosecution for pretended offenses.

From the viewpoint of the would-be nullifiers, such prosecution has many advantages. The cost is borne by the state (out of tax funds partly supplied by the Negroes themselves). And even if there is an acquittal, the defendant is subjected to arrest; may be oppressed by punitive bail requirements; is put to the expense of preparing and presenting his defense; and, at a minimum, is distracted for a considerable time from his pursuit of racial justice. If a hostile jury charged by an elected judge finds him guilty, the burden of appellate litigation (often reaching through several tiers of state tribunals and finally to this Court) multiplies the hardship. And there is always the possibility—known not only to the defendant but to the tens of thousands of onlookers whose intimidation is a primary object of the cruel game—that even a groundless conviction may survive appellate review if defense counsel fails to negotiate the procedural traps which lurk in trial and appellate practice.

This last consideration affords a chilling insight into the special significance of the threat against two of the appellants, Benjamin E. Smith and Bruce C. Waltzer, who are lawyers. One is Chairman, and the other is a member, of the Legal Panel of Louisiana Civil Liberties Union. They do not claim that their professional status immunizes them from criminal prosecution. What they do claim is that, solely *because* of their professional representation of persons claiming equal rights for Negroes, they have been arrested; their homes, automobiles and offices have been searched and their files violated; and they are threatened with indictment.*

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*After the present action was commenced, they were in fact indicted. The indictments are public records of which this Court can take judicial notice. We note that they are set forth as Appendix B to the brief of appellants.

This attack on lawyers because of their professional service in aid of the Constitution and laws of the United States is a new and dangerous manifestation. Until now, even the fiercest opponents of Negro rights have not officially questioned the lawyer's duty to represent his client. It is no secret, of course, that private disapproval of lawyers who defend unpopular persons and causes has tended to impoverish such lawyers and has sufficed to keep their numbers disgracefully small.* Indeed, the scarcity of lawyers available for civil rights representations in the Deep South led President Kennedy, on June 21, 1963, to request establishment of the Lawyers' Committee on Equal Justice Under Law, which has endeavored to correct the deficiency. See 49 Amer. Bar Assn. Jour. 785 (1963). But according to the allegations of appellants—which they say they stand ready to prove if permitted—Louisiana now treats a lawyer's civil rights work as felonious conduct.

Nothing stands between the Louisiana authorities (appellees here) and the achievement of their objective, but the federal district court. It will not do to say that the appellants should stand trial in the state court and, if necessary, appeal their convictions here. The damage will have been done. Thousands of precious man-hours and thousands of dollars will have gone down the drain. Not only will these appellants have been diverted from their pursuit of justice for the Negro, but the whole world—including Southerners loyal to the spirit and letter of our Constitution—will be

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* See, for example, Rostow, The Lawyer and His Client, ABA Journal, January 1962, February 1962; Downs and Goldman, The Obligation of Lawyers to Represent Unpopular Defendants, 9 Howard Law Journal 49 (1963); Symposium, The Right to Counsel and the "Unpopular Cause," 20 Univ. of Pitt. Law Rev. 725 (1959); Cheatham, A Lawyer When Needed (Columbia Univ. 1963); Sacks, Defending the Unpopular Client: National Council on Legal Clinics (Amer. Bar Center, 1961).

forcefully reminded of the price to be paid for faithful devotion to the mandates of Congress and this Court. And, be it remembered, even this Court's reversal of the convictions, and invalidation of the statutes on which they were based, would leave the state free to continue the harassment by additional unfounded prosecution on any charge whatever, from disorderly conduct on up.

These are the grounds on which the appellants have invoked the protection of the district court. It remains to inquire whether that court had legal cause for its refusal to adjudicate them.

II.

The district court erred in denying injunctive relief.

We find ourselves unable to improve on Judge Wisdom's refutation of the reasons advanced by the district court majority for its refusal to decide the merits of the case. His dissenting opinion accurately states the applicable law, with full documentation of his conclusion.

We offer only one additional observation, which Judge Wisdom may have deemed too obvious to require statement. The district court's repeated reference to the state's "right of self-preservation," and its insistence that the state can exempt itself from district court adjudication by simply *declaring* that it is exercising that right (even though the appellants offer to prove that Louisiana's effort is *not* to prevent subversion of *its* laws but to subvert the *federal* law) would, if approved, revitalize the long discredited doctrine of interposition. According to the district court, the state's assertion that its sovereignty is at stake constitutes a nontraversable allegation. If and to the extent that such a declaration is deemed controlling on the federal courts, the Civil War is undone.

Rather than repeat what Judge Wisdom has already said so well, we invite attention to an aspect of the case which goes beyond the narrow though important issue presently before the Court. The majority opinion of the two district judges commands attention for a broader reason: it constitutes an eloquent (though probably unintended) commentary on certain difficulties in the administration of the federal judiciary—difficulties which this Court has power to correct.

In the peroration of their opinion, the district judges say (R. 74-75):

> "For the good of all it is to be hoped that this case will reach the Supreme Court so that the matter of State-Federal relations in the judicial field may be clarified. If the federal district judges are to act as a police force to ride herd over state and municipal courts *then we had best be so instructed* and the matter once and for all laid to rest * * *." (Emphasis added.)

Looking past the acid exaggeration involved in the term "police force," we see the words of beleaguered men. Theirs is the hard task of enforcing Federal law in a community —*their own* community—where hate of that law, and of those who impose it, finds myriad tongues. If they are not to be regarded as traitors, and (along with their families) subjected to the ostracism and other reprisals that are visited upon turncoats, they need *to be instructed.* Then can they repel community pressures by saying, if they must, that they are doing only what they are compelled to do. "What the district judges need [in the racial field]—and what most of them want—is not the responsibility for making choices, but rigid mandates that compel them to act." Peltason, *Fifty-eight Lonely Men*, p. 245 (1961).

Scrutiny of the district court opinion will reveal several points on which clarification by this Court would greatly strengthen the fabric of judicial administration. As we have already said, we think the present case is so clear that a reversal might well be predicated simply on the dissenting opinion below. But it is right for this Court, charged as it is with the duty of improving the efficiency of the whole federal court system, to take cognizance not only of the instant case but of the dozens and hundreds of others that will follow. The public interest requires accurate adjudication at the trial level; appeals should be needed only when the law is truly unclear.

First: We respectfully suggest the need for an explicit statement as to the reach of *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956). It would seem clear that the "field" there held to be pre-empted by Congress is the suppression of sedition sponsored by foreign governments—notably the actions of the Communist Party of America. That Party has been held to be bent on overthrow of all our governments, state and local as well as Federal. *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961). The possibility of conflict between Federal and state action, which the Court in *Nelson* undertook to avoid, exists whenever the state endeavors to punish sedition of this type. The conflict is not avoided or lessened if the state purports to forbid only sedition against itself, and not against the United States, since the investigation and proof would be the same as if sedition against the United States were also forbidden. To the extent (if any) that *Nelson* leaves open the possibility that states may prosecute for sedition directed against themselves, it can only refer to purely local revolutionary activity of the sort involved in *Luther* v. *Borden*, 7 How. 1 (1849).

We had thought it entirely clear that *Uphaus* v. *Wyman*, 360 U. S. 72 (1959) did no more than confirm the legality

of state *investigations* of sedition, and that it left *Nelson* undisturbed in so far as state *prosecutions* are concerned. Yet, in the present case, two district judges have held otherwise (R. 71).

Moreover, the line between prosecution and investigation is not as clear as it might be. This Court knows that legislative exposure can be used for purposes of punishment rather than enlightenment, and has condemned the practice. *Watkins* v. *United States*, 354 U. S. 178 (1957). It would seem that the *Nelson* rule forbids states to punish sedition aimed at overthrow of the federal government (even if it is also directed at state governments), whether such punishment takes the form of prosecution or investigation. That is to say, the logic of the rule would seem applicable to investigations shown to be purely punitive—as would be true, *prima facie* at least, where state legislatures engage in exposure-type investigations on subjects as to which they lack legislative power.

An authoritative statement by this Court demarcating the area covered by the *Nelson* rule would be most helpful to litigants and to the state and lower federal courts.

Second: We respectfully suggest the need for a statement by this Court as to whether *Uphaus* v. *Wyman* has any vitality as a precedent. We recognize that the invasions of associational privacy by the registration requirements of the Louisiana Subversive Activities and Communist Control Law go far beyond anything upheld in the *Uphaus* case or any other. But, with all respect, we say that *Uphaus* was an unfortunate aberration when it was decided, breaking sharply with this Court's prior decision in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); that it is inconsistent in principle with later decisions, such as *Bates* v. *Little Rock*, 361 U. S. 516 (1960) and *Talley* v. *California*, 362 U. S. 60 (1960), which recognize and repel

assaults on First Amendment freedoms through enforced publicity; that it is wholly indistinguishable from *Gibson* v. *Florida Legislative Investigation Commission*, 372 U. S. 539 (1963); and that it is a source of continuing mischief in civil rights cases.

The inconsistency between *Uphaus* and other decisions of this Court, both before and since, emboldens us to suggest that *Uphaus* can only be explained on the basis of a misunderstanding by the Court as to the effect of the New Hampshire statute there involved. The statute began with a vague definition of "subversive person," almost identical with the one which this Court held void for vagueness in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964)* but even more sweeping in its terms. The two definitions are identical except that the Washington definition involved in *Baggett* applied the label of "subversive person" to anyone who belonged to a subversive organization *with knowledge of its subversive character*. This requirement of *scienter* was omitted from the New Hampshire statute involved in *Uphaus*, so that a "subversive person" as there defined might be a wholly innocent member of an organization deemed subversive. The effect was to brand as "subversive persons" a multitude of persons whom there was no reason to regard as actually subversive in any generally understood meaning of the word. The *Uphaus* majority then proceeded to appraise the New Hampshire investigation of these "subversive persons" as though they had really been shown to *be* subversive persons—*without the quotation marks*. Only on that basis could the New Hampshire investigation have been deemed to pass the test as later formulated in *Gibson* (372 U. S. at 546):

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* The respective statutory definitions are quoted at 360 U. S. 78, n. 6 and 377 U. S. 362.

> "* * * it is an essential prerequisite to the validity of an investigation which intrudes into the constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."

In *Uphaus,* the Court evidently intended to apply the same rule, since it examined the record to see whether the state had established a substantial relationship between the information sought (names of guests at a pacifist camp operated by Dr. Uphaus) and a subject of legitimate state interest (presence of subversive persons within the state). This relationship was held to be present because there was evidence that Dr. Uphaus and nineteen speakers at the camp were "subversive persons" *within the meaning of the artificial statutory definition.* But there was no evidence at all that any of them were actually subversive; and it can hardly be contended that the state has a legitimate interest in learning and publicizing the names of non-subversive persons, simply because the state chooses to *call* them subversive. The "essential prerequisite" to the investigation was therefore wholly lacking.

If *Uphaus* were dead and forgotten, we would not exhume it simply for purposes of proper burial. But its ghost haunts the civil rights movement. Its very illogic invites its invocation by litigants as a mystic symbol of States' Rights, in the hope that sympathetic courts will find it useful in providing color of respectability to an otherwise indefensible position. In *Gibson,* it served to encourage a destructive legislative investigation that should never have been undertaken. In the present case, it was employed as an antidote for the *Nelson* pre-emption rule. In dozens of cases it has appeared to becloud the issues. Repeatedly it

has drained the resources of civil rights organizations for expenses of appellate litigation needed to correct errors which it has occasioned. This mischievous ghost can be laid only by a candid declaration that *Uphaus* was wrongly decided and is not the law.

To be sure, it has been suggested that existence of state power to violate associational privacy depends on whether the association in question is a "good" or a "bad" one. The district court seems to have been hinting at such a distinction when it declared (R. 73) that one of the questioned Louisiana statutes might well be *unconstitutional* as applied to the N. A. A. C. P. (which it said had been held to be "a valid, lawful, private activity" in *State* v. *N. A. A. C. P.*, 181 F. Supp. 37 (E. D. La. 1960), aff'd sub nom. *Louisiana* v. *N. A. A. C. P.*, 366 U. S. 293 (1961)), but *constitutional* as applied to "an invalid, unlawful secret activity" (evidently referring to appellant Southern Conference Educational Fund).

The trouble with such a distinction is that it either involves circular reasoning, or stretches judicial notice beyond all recognized bounds. If World Fellowship, Inc. (the organization involved in *Uphaus*) and Southern Conference Educational Fund (the organization involved in the present case) are "bad" and the N. A. A. C. P. (involved in *Gibson*, *Bates* and *N. A. A. C. P.* v. *Alabama*) is "good," how does the Court know it? The very purpose of the challenged investigation is usually to find out—or, at least, that is its asserted justification.

Another basis for reconciliation of *Gibson* with *Uphaus* has been advanced by lawyers more cynical than we. They say that the state's power depends on whether the organization to be investigated is suspected of a "red" or a "black" conspiracy—i.e., Communist or Negro. *Gibson*, they say, protects the latter; *Uphaus* leaves the former naked.

We are reluctant to believe that such an explanation reflects the Court's thinking. The First Amendment guarantees of speech, press and assembly are general in scope, and do not appear to contemplate exclusion of any communication or organization whatever, so long as it remains peaceable. But if we are mistaken, and the Court does mean to embrace such a distinction, then it is imperative that a line be drawn with absolute clarity. *Gibson* and the present case illustrate the growing tendency of certain state governments to equate Negro equalitarianism with Communism, and to investigate or "control" civil rights organizations on the basis of subversion charges. If *Uphaus* is to remain on the books, exact and unmistakable criteria should be set forth for use by state and lower federal courts in determining whether *Uphaus* or *Gibson* is to be followed.

Such clarification might lessen the stream of litigation which will otherwise flow to this Court. For reasons already stated, however, we respectfully submit that *clarification* would not get at the basic trouble. *Uphaus* is wrong in principle. Its devastating effects are attested, on the basis of wide judicial experience, by Judge Wisdom in his dissenting opinion below (R. 96):

> *"Uphaus,* if I may say so, is of small help in our national efforts against Communism but it offers great prospects for disguising unlawful state action against federally protected rights."

It should be explicitly disapproved.

Third: We respectfully suggest the need for restatement and clarification of the rule of *Douglas* v. *Jeannette,* 319 U. S. 157 (1943), which declares that federal courts will not enjoin state criminal proceedings, even though such proceedings are claimed to violate federal rights, *except*

where such an injunction is the only feasible means of protecting those rights. The rule is sound, but—as the opinion below well illustrates—the meaning of the exception is not sufficiently understood.

Chief Justice Stone, speaking for the Court in *Douglas* v. *Jeannette*, took pains to make clear the limitations on the scope of the decision. The plaintiffs, Douglas and others, had sought a federal injunction against a city license tax as applied to the distribution of religious literature. On the same day that *Douglas* v. *Jeannette* was decided, this Court had held the tax to be invalid under the First and Fourteenth Amendments. *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). In ruling that the injunction sought by Douglas and his co-plaintiffs should be denied, the Court made it very clear that relief was withheld only because there was no reason to doubt that the city would respect and follow the *Murdock* decision, just announced —no reason to suppose that the city would make any further effort to impose the tax on distribution of religious literature. The Chief Justice said (319 U. S. at 164, 165):

> "It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith * * * .
>
> "There is no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."

There being no allegation or proof that there was a threat of irreparable injury justifying injunctive relief, it was held that though federal jurisdiction existed, there was no cause of action in equity. In the absence of any reason to

anticipate bad-faith efforts to collect the illegal tax, there was no occasion for intervention by the federal district court.

When *Douglas* v. *Jeannette* was decided, and for some years thereafter, cases were rare in which full protection of federal rights could not be achieved by ultimate review, in this Court, of the final judgments of state courts of last resort. That was because abuse of state criminal process was not widespread; prosecutions were initiated for the purpose of obtaining convictions that would stick, not for the purpose of discouraging the *assertion* of federal rights by harassing their claimants with unfounded charges costing much time and money to defend. The gist of the typical federal claim was that a federal right would be denied by a final state court *judgment*.

The 1960's have brought a new legal phenomenon: prosecutions brought, sometimes on a wholesale basis, with no real expectation of a judicial victory but with every hope of punishing civil rights advocates by imposing crushing litigation burdens upon them. This Court has already reversed a good number of such convictions, involving the 1961 Freedom Riders, and thousands of similar cases are on their way up from Jackson, Danville, Cambridge and a dozen other trouble spots. In such cases the gist of the federal claim is that *the prosecution itself* constitutes a denial of federal right.

That is the claim asserted by appellants in the present case. It falls squarely within the recognized exception to the rule of *Douglas* v. *Jeannette*. Yet the district court, evidently misunderstanding the meaning of the exception, has misapplied the rule.

We respectfully submit that this Court should make entirely clear the availability of federal injunctive relief

against any state court prosecution which is alleged and proved to have been threatened (*or begun**) as a reprisal for exercise of federal rights.

Fourth: We respectfully suggest the need for reconsideration of the so-called "abstention doctrine," which originated with *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941). There, for the first time, the Court held that district courts should sometimes refrain from exercising jurisdiction which they admittedly possess, because of unclarity of the state law.

Throughout its short life, the abstention doctrine has been a source of unpredictability for lawyers and judges alike—occasioning, indeed, repeated disagreement as to its scope and application among the Justices of this Court—and has injected much harmful delay into the adjudicatory process. In recent years it has been increasingly used by the district courts as a means of deferring or avoiding the distasteful task of enforcing federal law hated by the local community. In the present case, the lower court has given it an application which, if upheld, would virtually destroy the federal question jurisdiction of the district courts. It is time to take stock and consider whether the basic objective of the doctrine cannot be better served by other means.

Let us examine the *Pullman* decision with a view to identifying that objective. The Texas Railroad Commission had issued an order requiring all sleeping car trains to carry a

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* As to injunctive relief against state prosecution begun before the federal action is commenced, there is a question whether 28 U. S. C. §2283 forbids federal intervention. It has been held that this statute is inapplicable to cases brought under the Civil Rights Act. *Morrison* v. *Davis*, 252 F. 2d 102 (C. A. 5, 1958), cert. denied 365 U. S. 968 (1958); *Cooper* v. *Hutchinson*, 184 F. 2d 119 (C. A. 3, 1950); cf. *United States* v. *Wood*, 295 F. 2d 772 (C. A. 5, 1961), cert. denied 369 U. S. 850 (1962). This Court has not yet expressly adjudicated the question.

Pullman *conductor*. The practice, on trains having only one sleeper, had been to carry only a Pullman *porter*. (In Texas at that time, all Pullman porters were Negroes and all Pullman conductors were white.) The Pullman Company, joined by the porters' union as intervening plaintiff, sued in the federal district court to enjoin the Railroad Commission from enforcing the order as beyond the Commission's statutory authority and as violative of the federal due process, equal protection and commerce clauses. The district court held the order invalid on the ground that the powers granted to the Commission by Texas statute did not include authority to make such a regulation; and an injunction was granted. This Court reversed, holding that the injunction should be vacated "pending a determination of proceedings, to be brought with reasonable promptness, in the state court" for an interpretation of the Texas statute. (312 U. S. at pp. 501-502.)

Three arguments can be made in favor of this result, all three of them being based on the proposition that state courts have (and should have) final authority to determine the *meaning* of state statutes:

(1) It is desirable to avoid unnecessary rulings on constitutional questions. If this Court had proceeded to review the district court decision on the merits, it might have disagreed with the lower court and might have held that the Texas statute *did* authorize the Commission's order. The constitutional validity of the order would then have had to be decided. Had the highest state court thereafter held that the statute did not authorize the order, the constitutional questions would have been decided unnecessarily. (This point is made by Mr. Justice Frankfurter, for the Court, at 312 U. S. 498.)

(2) Decisional inconsistency is to be avoided. If this Court had proceeded to review the district court decision on the merits, it might have upheld the Commission's order against all objections. Had the highest state court thereafter held (in a case involving another railroad) that the statute did not authorize the order, the state and federal courts would have reached contrary conclusions as to its validity. (This seems to be the thought behind Mr. Justice Frankfurter's comment at 312 U. S. 500: "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.")

(3) The federal court should not take action which will make it impossible for the state courts *ever to rule* on a question of statutory interpretation as to which they have the final authority. The injunction granted by the district court would have precluded any enforcement action by the Commission, so that plaintiff, Southern Railway Co., could never have been brought before a state court on this issue. Any other railroad brought into a state court could have removed the case to the federal district court (jurisdiction being predicated on the federal questions). Thus, the state statute could never have been interpreted by the state courts.

Although none of these arguments lacks weight, only the third seems unanswerable. The avoidance of constitutional issues, however wise, is based on a self-denying rule of practice which might well yield to the parties' right to present resolution of their controversy—a controversy which, by hypothesis, the federal courts have jurisdiction to decide. Consistency as between litigants similarly situated is indeed important; yet it yields to the need for a better

rule of law whenever a precedent is judicially overruled or legislatively repudiated. But the need to keep open an avenue for state court resolution of state law questions cannot be overridden without undermining a bed-rock requirement of federalism. For this Court to say that the state courts have the right to the last word in deciding the meaning of state statutes, and then to prevent them from speaking that word, would be to embrace a fiction.

We have already described the compelling necessity for quick intervention by the federal district courts to prevent the utter evisceration of federal rights in the states of the Deep South. (See pp. 7-10, 19, *supra*.) This necessity was not so clear, perhaps, in 1941 when *Pullman* was decided; but events of the last few years have demonstrated it beyond the possibility of doubt. Repeatedly the district courts have refused to decide cases within their jurisdiction, cases that cried out for decision, and have stood silently by while the civil rights of litigants by the hundred have been ground to bits by plainly unconstitutional state action. See, *e.g.*, *Bailey* v. *Patterson*, 199 F. Supp. 595 (S. D. Miss. 1961), vacated and remanded 369 U. S. 31 (1962); 206 F. Supp. 67 (S. D. Miss. 1962), reversed in part 323 F. 2d 201 (C. A. 5, 1963). It is of course true, as this Court has more than once had to point out, that abstention is justified only in "exceptional circumstances" (*Meredith* v. *Winter Haven*, 320 U. S. 228, 234 (1943)), and should not be practiced as a matter of course (*N. A. A. C. P.* v. *Bennett*, 360 U. S. 471 (1959)). But the beleaguered district courts—usually quoting this Court's statements as to state-federal comity, the delicacy of state-federal relationships, the policy of avoiding constitutional issues, and the desirability of decisional consistency—have avidly seized on the abstention doctrine and have utilized it even in cases where it was plainly inapplicable. In the present case, the district court

has indeed gone so far (for the stated purpose of preserving the federal system) as to withhold adjudication of *federal* questions until the state courts can first pass on them.

The demonstrated susceptibility of the abstention doctrine to misuse, despite all the efforts of this Court to clarify its meaning, justifies inquiry as to whether the first two of the three considerations set forth above—avoidance of constitutional issues and the danger of decisional inconsistency—are not outweighed by the dominating necessity of preventing utter nullification of the federal law. For reasons already stated, we submit that the answer must be in the affirmative.

The question then arises whether the third consideration—the need to preserve state court access to state law questions—can be accommodated by a procedure less destructive of federal authority than abstention has proved itself to be. Again, we offer an affirmative answer.

In the *Pullman* case, the problem could have been solved by issuance of the federal court injunction *with a proviso* that it should not be deemed to prevent the Railroad Commission from seeking state court review in a manner approved by the federal district court. For example, that court could have authorized a single state court prosecution for violation of the order, or the Commission could have been permitted to institute a declaratory judgment proceeding, the district court making provision (by means of a conditional decree) against removal of such proceeding to the federal courts.* Jurisdiction would be retained, to permit modification of the federal judgment in the light of any state court ruling thus obtained. But—and this is the

* For example, the federal injunction judgment could provide that removal proceedings would result in dissolution of the injunction.

key point—the district court would have *proceeded to judgment*, and would have granted the relief it believed to be required by law, without waiting months or years for the state court to act.

As a matter of fact, this was precisely the result that was reached, informally, in *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167 (1959). The Court directed abstention pending state court interpretation of the five Virginia statutes there involved, but exacted assurances from the Virginia authorities that the appellees would never be proceeded against under the said statutes for any acts done during the full pendency of the litigation. (360 U. S. at p. 179.) The effect was the same as if an injunction had been granted on the terms outlined above. A somewhat similar result was achieved in *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957), where the state court was permitted to construe a pertinent state statute but was forbidden, meanwhile, to disturb the federal plaintiff's possession of certain disputed realty.

A review of the decisions of this Court approving abstention will reveal that every one of them presented the problem of preserving state court access to state law questions, and could well have solved it by a decree similar to that postulated above, without any delay in adjudication. In addition to cases already cited, they are:

Chicago v. *Fieldcrest Dairies*, 316 U. S. 168 (1942);

Burford v. *Sun Oil Co.*, 319 U. S. 315 (1943);

Spector Motor Service, Inc. v. *McLaughlin*, 323 U. S. 101 (1944);

American Federation of Labor v. *Watson*, 327 U. S. 582 (1946);

Staiuback v. *Mo Hock Ke Lak Po*, 336 U. S. 368 (1949) (semble; Territorial Act rather than state statute);

Shipman v. *Du Pre*, 339 U. S. 321 (1950);

Alabama Public Service Commission v. *Southern R. Co.*, 341 U. S. 341 (1951);

Albertson v. *Millard*, 345 U. S. 242 (1953);

Government and Civil Employees Organizing Committee, C. I. O. v. *Windsor*, 353 U. S. 364 (1957);

Meridian v. *Southern Bell Tel. and Tel. Co.*, 358 U. S. 639 (1959);

Louisiana Power and Light Co. v. *Thibodoux*, 360 U. S. 25 (1959);

N. A. A. C. P. v. *Bennett*, 360 U. S. 471 (1959).

The reasons which ordinarily militate against reconsideration of previous rulings are present here only in attenuated form, if at all. No rights have vested in reliance upon them. And all substantive issues which they involved were presumably decided the same way—eventually—as if the procedure here suggested had been followed.

Moreover, *first principles are at stake.* This is not the first time that the very foundations of effective federal jurisdiction have been assaulted in the name of States' Rights. Repelling such an attack in *Cohens* v. *Virginia*, 19 Wheat. 264, 404 (1821), the whole Court, speaking through Chief Justice Marshall, declared:

"It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as

> the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

It is pertinent to observe that in 1941, when the abstention doctrine was announced, there was little reason to apprehend that the authority and power of the federal judiciary, so fiercely challenged in Marshall's day, would once again be put in jeopardy. In 1941 it may have been reasonable to regard abstention simply as a refinement of judicial administration which would improve the quality of final decisions without greatly impairing the speed or efficacy of the judicial process. The *Pullman* opinion seems to assume as much. See 312 U. S. at pp. 500-501. But in 1964 it is clear that this expectation has been disappointed. We respectfully suggest that the abstention doctrine should now be explicitly disapproved.

CONCLUSION

The decision below reflects a growing danger that the federal district courts may be going lame. A main purpose of their creation (if, indeed, not the only one) was to enforce the federal law in the face of local hostility. In the present case, as in too many others, this purpose has been frustrated.

We urge that the present status of *Pennsylvania* v. *Nelson*, *Uphaus* v. *Wyman* and *Douglas* v. *Jeannette*, which have given rise to persistent and repeated misunderstand-

ing in the lower courts, be now clarified. And we urge this Court to make clear, beyond any possibility of rational doubt, that it is the duty of the district courts to *decide* cases. To paraphrase the final sentence in Judge Wisdom's dissenting opinion, they should be instructed—and helped—to get on with their work.

Respectfully submitted,

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September, 1964